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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 844

FLOYD B. HARMON,
Petitioner,
vs.
UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment in the above case of the United States Court of Appeals for the Sixth Circuit, entered in this cause on December 19, 1964.

OPINION BELOW

The opinion of the court of appeals has not as yet been reported, but is printed in the appendix, (App. 15). There was no official report of the case in the United States District Court for the Eastern District of Michigan, Southern Division.

JURISDICTION

The judgment and the opinion of the Court of Appeals was entered on December 19, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

I.

Whether government counsel committed prosecutorial misconduct requiring reversal by:

(1) calling unnecessary witnesses whom he knew would invoke their privilege of self incrimination and which privilege he recognized.

(2) directing questions to the witnesses after their refusal to testify over defense objection, which depicted the alleged offense in its entirety.

(3) continuing to direct such questions after the witnesses gave identification testimony only and then invoked their privilege.

(4) referring to these witnesses' refusal to testify in his closing argument.

II.

Whether a trial court can give any cautionary instruction that can safeguard a defendant's right to a fair trial where the prosecution knows that several of his own witnesses are going to invoke their privilege against self incrimination and each of whom do in fact invoke it and continue to do so, and over the defendant's objection they are permitted to continue to testify in the presence of the jury.

III.

Whether the proofs of the alleged unauthorized use of a union's credit card by an official thereof for alleged personal use and the payment of said credit charges from the union's funds as authorized by him constitute the crime of embezzlement.

STATUTES INVOLVED

The pertinent statutes are printed in the appendix *infra* (App. 24, 25).

STATEMENT

The petitioner, Floyd B. Harmon, was convicted of violating the Labor-Management Disclosure Act, 29 USC 439 (c) (12 counts), and 29 USC 501 (c) (12 counts) by embezzling (App. 26) monies belonging to Local 614, IBT and in making and causing to be made false entries in the union's books and records. Testimony and documentary evidence demonstrated that the defendant utilized certain credit cards belonging to the Union for the purchase of gasoline and certain boat equipment for a boat which he used. The evidence further demonstrated that payment for these charges were made by the union with the approval of the petitioner in his capacity as Secretary-Treasurer of the union.

The evidence further showed that Union business was conducted by the petitioner on the boat during the period of time charged in the indictment. In rebuttal, government counsel called to the witness stand in addition to others, three (3) witnesses, each of whom invoked their privilege against self incrimination after giving testimony only as to their identification. Government counsel, over defense

objection, continued to ask each witness questions which depicted the alleged offense in its entirety (App. 40-50).

Upon defense counsel's objection and motion for mistrial (App. 27-28) government counsel admitted that each of these witnesses had informed him previously that they did not intend to testify and would invoke their privilege against self incrimination. It was his contention that it cannot be determined conclusively that a witness will refuse to testify and invoke his privilege until he has been called to the witness stand, sworn and the questions directed to him. Government counsel also contended that after the witnesses informed him they would claim privilege that he stressed to them their duties as witnesses and advised them to search their consciences and had not talked to them since (App. 27-39).

He also made reference to the refusal of the three witnesses in his closing argument to the jury (App. 60).

The trial court overruled defense objections and denied the motions for mistrial which were interposed at the time each witness initially refused to answer, and at the conclusion of the presentation of evidence by both sides (App. 28, 44, 47, 59, 60).

The court of appeals affirmed the judgment of the district court. It held that the defendant did not claim that government counsel was guilty of misconduct rather his claim was that the trial court erred in allowing government counsel to call these witnesses. It held that the trial court had no right to preclude either party from calling witnesses and could only pass upon the issue after each witness was sworn and invoked privilege. It also held that any error in calling the witnesses was cured by the cautionary instruction given and that considering the entire record, calling these witnesses did not constitute prejudicial error.

It also held that the offense of embezzlement and conversion within the meaning of the act were established by the evidence. It further held that Congress did not intend that technical common law distinctions be rigidly applied as evidenced by the policy disclosed in §501 (a) of the Act.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case and that of the Court of Appeals for the District of Columbia in *Fletcher v. U.S.*, 332 F. (2) 724 (1964) are in conflict. The decision in that case was based upon that court's interpretation of *Namet v. U.S.*, 373 U.S. 179, 83 S. Ct. 1151 (1963).

In the *Fletcher case*, the appellate court held that the court must look to the surrounding circumstances in each case to determine whether the proceedings involving a witness claiming privilege, were so unfair to the defendant on trial as to constitute reversible error. The circumstances in that case were:

(a) The government and the court knew that the witness would refuse to testify, claiming his Fifth Amendment privilege.

(b) The prosecutor asked a series of questions which depicted the alleged offense in its entirety.

(c) The testimony sought from the witness provided the principal source of support for the government's case and thus, if the jury drew inferences from the witness' refusals to answer, these inferences would have served that purpose.

(d) The witness' refusals to testify were not incidents in the course of other admissible evidence given by him other than the formalities.

(e) The witness' refusals were not mere incidents in a long trial.

(f) The instructions given by the court regarding the inferences to be drawn from the witness' refusal were defective, (however, stating that they were not deciding whether a proper instruction could cure the error).

In the instant case the above circumstances are present. Government counsel admitted that each of the three (3) witness had informed him prior to their being called to the stand that they would not testify and would claim their privilege. He also directed questions after their claim of prividege which depicted the alleged offense in its entirety and received an answer of a refusal to testify for fear of self incrimination. These questions to which each witness claimed privilege were very damaging to the petitioner's only defense that the boat was used on union business. In addition, each witness occupied a position of importance with the same local union with which the petitioner, Harmon, was affiliated. The refusals of each witness constituted the sum of his participation in the case save for the formalities of name, address and position. The refusals were not, therefore, incidents in the course of other admissible testimony given by them.

2. The decision of the court below is contrary to the principles implicit in the decision of this court in *Namet v. U.S. supra.*

In that case the prosecutor initially did not believe that the witnesses could properly invoke their privilege against self incrimination because of a prior guilty plea to the same charge. The witnesses possessed non-privileged information which supported the government's case and which they

were ordered to divulge by the court. The witnesses answered or were ordered to answer all but a small number of the questions directed to them by the prosecutor. It was held that these few lapses viewed in context of the entire trial did not amount to planned or deliberate attempts by the prosecutor to exploit witnesses' refusals to testify. It was further held that the few instances in which the claim of privilege was sustained did not constitute reversible error in the absence of prosecutorial misconduct. The inferences apparently drawn by the jury were already well established by the non-privileged portions of the witnesses' testimony.

In the instant case there was no indication that the prosecutor did not believe that the witnesses could properly invoke their privilege. He did not challenge their invocation of this privilege in a single instance. Further, no ruling was ever asked for, or given, concerning these witnesses' refusals to testify. The witnesses gave no testimony other than to identify themselves and were not ordered to answer any of the remaining questions. The conclusion is inescapable that the prosecution's only purpose in continuing to direct questions was to improperly influence the jury. The testimony of these witnesses was not essential to the government's case. They were merely called to rebut the defendant's claim that the boat was used for union business and were only three out of a total of ten rebuttal witnesses called. The government's contention that it was necessary to call them because of their positions as Business Agent, an Organizer and Vice-President of the same local union as the petitioner, to prevent the jury from inferring that he did not call them because their testimony would support the defendant's claim, is fallacious. The jury would be equally as likely to infer that the defendant did not call these wit-

nesses because their testimony would not support his claim.

3. If it is found that the cases as cited are not in conflict, there is raised, in any event, an important question of federal law which should be settled by this court for the purpose of guidance of lower courts. The case at bar is illustrative of the problem of the trial court procedures and rules of law which have not been spoken on by this court and which apparently, the trial court improvised at its own discretion. Upon being notified that the prosecutor had known of the refusal to testify by the three witnesses prior to their being called to the witness stand the trial court merely questioned respective counsel concerning this issue. There was no effort made to determine the good faith or knowledge of the prosecutor in a separate hearing. There was no effort made to exclude the jury and instead they were allowed to hear testimony in the form of a refusal to answer questions which depicted the alleged offense in its entirety. The trial court made no effort to determine the validity or correctness of each of the witnesses invocation of the plea against self incrimination. The circuit court in its opinion (App. 22) cited this court's decision in *Namet v. U. S., supra*, as standing for the proposition that an erroneous cautionary instruction does not constitute reversible error if no objection was made thereto. That this rule of law was not pronounced by that case becomes apparent upon a reading thereof. The more important question in this area is a determination as to whether or not any type of cautionary instruction could cure the prejudice that was unfairly directed against the defendant in that, as people ordinarily reason, the jury would have inferred that the witnesses refusals to answer was so that they would not have to admit that they either did not know anything about the boat involved or that the

boat was being used by the defendant for his own use and not for union business.

The various circuit courts indicate a decided lack of consensus as to whether or not a cautionary instruction to the jury could cure this prejudicial error and indeed there is no uniformity concerning procedure that should be employed by the trial court in a situation of this kind. Certainly there are indications that the second circuit feels that the prejudice caused by such action of the prosecutor could not be cured by such an instruction. E.G., *U.S. v. Five Cases, Figlia Mia Brand Oil* (CA 2, Conn.) 179 F. 2d 519, 523 (1950). The third circuit in *U.S. v. Tucker,* 267 F. 2d 212, 215 (1959), indicated more affirmatively that the question of prosecutorial misconduct in this area could not be cured by any instruction and in this case simply advised the prosecutor not to call the witness whom it "had reason to believe" would interpose a proper plea of self incrimination. Further the dissenting opinion of Mr. Justice Black of this court in *Namet v. U.S. supra* completely omits any reference to a cautionary instruction in regard to this problem and affirmatively indicates that it is error for a trial court to permit the prosecutor to continue questioning a witness when he knows the witness' only answer will be a refusal to answer on the ground of self incrimination. In addition that this error would be prejudicial to the defendant. Other circuit courts have affirmatively held that the error if committed, could be cured by a cautionary instruction of the court to the jury. E.G. *Weinbaum v. U.S.* (CA 9) 184 F. 2d 330 (1950); *U.S. v. Amadio* (CA 7) 215 F. 2d 605 (1954). The second circuit has additionally spoken on the philosophy of the probability of a cautionary instruction curing an error of this type. It was the consensus of that court that an instruction probably would do no more than call the jury's attention to the evidence in

question. However, it did reverse the case before it because the instruction had not been given. E.G. *U.S. v. Maloney* (CA 2d) 262 2d 535 (1959).

The *Fletcher case supra* also casts doubt upon the ability of cautionary instruction to cure this error. Indeed this court, being the first circuit court to render a decision on this problem after this court's decision in *Namet*, presented a series of circumstances which it felt must be found in dealing with this question and of the many circumstances mentioned only one of which was the instruction given.

In the case at bar there is no question but that the trial court and the circuit court both felt that the cautionary instruction which had been given certainly cured any error caused by the prosecutor's conduct. That the circuit court in the case at bar did not consider the factors raised by *Fletcher* and did not consider the *Namet* case as being on point, indicates a different approach to the problem than has previously been suggested by this court. There is presently no method of procedure which the trial court in this matter could have followed with fairness to the defendant. There was no way for the defendant to determine conclusively what the factual knowledge of the prosecutor was concerning this issue. There was no way for the trial court to modify or reduce the unfair prejudice generated against the defendant by these witnesses refusing to testify. The prosecutor's conduct was called into issue with no determination made as to the genuineness of the conduct. The efforts of the trial court to innovate procedures dealing with this problem were not uniform and were not subject to any method of procedure that has been used by other courts. Illustratively, the treatment of the trial court of the witness, Harrelson (App. 51-56) was different than its treatment of the three aforementioned witnesses, merely

on the theory that the court felt the prejudice to the defendant created by this witness who was going to refuse to testify on the ground he was under indictment was too great to be overcome by any instruction. In fact the prosecutor initially called this to the attention of the trial court as he also felt that there is a difference between this witness and his refusal to testify and the three prior witnesses and their refusal to testify (App. 51). These factors and the differences among various circuit courts indicates a strong need for a rule of law and procedure on this problem by this court. It is necessary that this court affirmatively determine whether or not the conduct complained of and the occurrences at the trial court can be cured by any instruction to the jury.

4. The decision of the court below conflicts with *Berra v. U.S.*, 221, F. 2d 590 (1955).

In *Berra* the Court of Appeals for the Ninth Circuit held, on similar facts, that the defendant could not be guilty of embezzlement because it was necessary that he receive the allegedly embezzled funds rightfully in the course of his employment and that he thereafter embezzle them to his own use. Since the defendant did not receive the funds from his employer but instead from the third party he could not be guilty of embezzlement. One of the indispensible elements in proving the crime of embezzlement is that the defendant must first have had lawful possession of the allegedly embezzled property. *Berra* held the defendant could not be guilty of embezzlement because he never had lawful possession of the union funds. The defendant had drawn checks in an amount greater than that owed by the union to a third party who thereafter "kicked back" a portion of the money to the defendant. It was held that the monies received by the defendant came not from the union but from the third party. Further,

that the payment by the union for the painting done on defendant's home was not embezzlement.

The instant case is in conflict in that it holds the defendant may be guilty of embezzlement even though he had no possession of any monies or funds of the union, either lawfully, or unlawfully, at any time. It holds that embezzlement was established by the evidence of an unauthorized use.

5. The instant case is also in conflict with *Morissette v. U.S.*, 342 U.S. 246, 72 SC 240 (1952) which held that when Congress borrows terms of art in which legal tradition and practice are accumulated it presumably knows and adopts the ideas attached to each such term in the absence of directions to the contrary.

The appellate court held in the instant case that Congress clearly indicated in §501 (a) that it did not intend technical common law distinctions between various types of crimes should be rigidly applied. Section 501 (a) contains no "contrary directions", nor does it provide other definitions for the terms used. The decision, therefore, conflicts with *Morissette* in that it departs from the traditional meaning given the terms without indication of Congress that such departure was directed or intended.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari in the above entitled cause should be granted.

Respectfully submitted,

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APPENDIX

No. 15,724

IN THE

United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. FLOYD B. HARMON, *Defendant-Appellant.*	APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided December 19, 1964.

OPINION

Before WEICK, Chief Judge, CECIL, Circuit Judge, and TAYLOR, District Judge.

WEICK, Chief Judge. Defendant-Appellant Harmon was secretary-treasurer and a business agent of Local 614, International Brotherhood of Teamsters, a labor organization, with its headquarters in Pontiac, Michigan. He was also in charge of its office.

Harmon was convicted by a jury in the District Court on all twenty-four counts of an indictment charging him with embezzlement and conversion of union moneys and funds and making false entries on the union's books with respect thereto, in violation of the Labor-Management Dis-

closure Act. 29 U.S.C. §§501(c)[1] and 439(c).[2] The imposition and execution of sentence was suspended by the court and he was placed on probation on counts 1 through 24 for a period of two years and fined $1,500 on count 1.

In his appeal Harmon contends (1) that his use of the funds of the union for personal purposes did not constitute the crime of embezzlement, and (2) that the trial court erred in permitting Government counsel to call three witnesses, who were co-union officials, and to question them concerning the boat, "The Princess Enterprise," when the Government knew that these witnesses would invoke their privilege against self-incrimination.

Evidence was offered by the Government which tended to prove that Harmon utilized credit cards, issued to the union by major oil companies, for the purchase of gasoline, supplies and equipment for his boat "The Princess Enterprise"; that during the period of the indictment these purchases totaled about two thousand dollars and were made by Harmon in marinas in the greater Detroit River area; that these purchases were billed to the union by the oil companies and were paid for by union checks drawn on its bank account, signed by Harmon; that Harmon approved the payment of all union bills and signed the checks; that Harmon told a boat marina operator, Roat, not to let his employees know about the arrangement; that Harmon

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[1] 29 U.S.C. §501:

"(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years or both."

[2] 29 U.S.C. §439:

"(c) Any person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept by any provision of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both."

never told the union bookkeeper about the boat or that the invoices were for boat expenses; that a former recording secretary of the union did not know that expenses in connection with the boat were being charged to the union and there was no discussion of a boat being used for the union at union meetings which he attended; that some other union officials did not know of the boat being used for union business; that Harmon did not show receipts for these expenses to some of the union trustees, although requested to do so; that shortly before a Labor Department audit was made of the union's books, Harmon paid back to the union $1,515.67; and that a Labor Department Investigator asked Harmon about the expenses and he did not answer the questions or tell the Investigator that the expenses were for union business.

Harmon, in his defense, offered evidence of a number of witnesses who testified that union business was conducted by him on the boat.

The District Judge submitted this disputed issue of fact to the jury under proper instructions, which are not in question here. The jury resolved the conflict in favor of the Government. The question raised by Harmon is whether this misuse of union funds constituted embezzlement and conversion.

The evil sought to be remedied by Congress was stated in the Act, as follows:

> "(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse

party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy." 29 U.S.C. §501(a).

It was the claim of Harmon that although the words in the statute, "embezzles * * * or converts to his own use," are in the disjunctive, they are synonymous; that the union's checking account was a chose in action representing a debtor-creditor relationship between the union and the bank, and was intangible property not capable of embezzlement or conversion.

We are unable to follow this reasoning. We think the crime of conversion has even wider application than embezzlement. Congress recognized that there was a difference between embezzlement and conversion by including both in the statute. The union's bank account would certainly come within the scope of the broad language of the statute, "moneys, funds, securities, property, or other assets of a labor organization." 29 U.S.C. §501(c).

The language in the statute, "embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use," would seem to cover almost every kind of a taking, whether by larceny, theft, embezzlement or conversion.

In §501(a) of the Act Congress indicated rather clearly its policy with respect to the fiduciary responsibility of officers, agents and representatives of labor organizations, and it would appear that technical common law distinctions of various types of crimes were not intended to be rigidly

applied. *Cf. United States v. Page*, 277 F.2d 3 (C.A. 2, 1960); *Arbuckle v. United States*, 146 F.2d 657 (C.A. D.C., 1944).

In *Morissette v. United States*, 342 U.S. 246 (1952), the Court, in construing 18 U.S.C. §641, said at pages 271 to 273:

> "It is not surprising if there is considerable overlapping in the embezzlement, stealing, purloining and knowing conversion grouped in this statute. What has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches. The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property. The codifiers wanted to reach all such instances. Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing. 'To steal means to *take away from one* in lawful possession without right with the *intention to keep wrongfully*.' (Italics added.) *Irving Trust Co. v. Leff*, 253 N.Y. 359, 364, 171 N.E. 569, 571. Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact. It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of

government property without interpreting it to punish unwitting conversions.

"The purpose which we here attribute to Congress parallels that of codifiers of common law in England and in the States and demonstrates that the serious problem in drafting such a statute is to avoid gaps and loopholes between offenses."

In our opinion the offenses of embezzlement and conversion within the meaning of the Act, were established by the evidence in this case. *United States v. Decker*, 304 F.2d 702 (C.A. 6, 1962).

The second point presents a more serious problem. The Government called three witnesses in rebuttal, who were the vice-president, business agent and organizer of the union. The Government's purpose in calling these three witnesses was to refute testimony offered by Harmon that the boat was used for the transaction of union business. After answering a few preliminary questions concerning their names, places of residence, and position with the union, they invoked their privilege against self-incrimination and refused to answer questions about whether they knew that the boat was used by Harmon for union business.

Regarding the knowledge of Government counsel that these witnesses would take the Fifth Amendment, their counsel made a statement to the court.[3]

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[3] "The Court: Just a minute.

Government's counsel informs the Court that they did not know whether he was going to take the Fifth Amendment before he took the stand.

Mr. Woods: That isn't what he said, your Honor. He said he did know. He was advised by this witness.

The Court: Let's get it clear.

Mr. Coleman. Your Honor, this is the Government's position. I cannot tell the whole position, your Honor, without violating the Grand Jury Rule. So I will eliminate part of my answer.

The Court: All right.

Mr. Coleman: I will talk just about certain matters.

(Continued on next page)

The trial judge made findings on this issue.[4]

The court gave cautionary instructions to the jury.[5]

The privilege against self-incrimination may not be asserted in advance of questions actually propounded. *Marcello v. United States*, 196 F.2d 437 (C.A. 5, 1952).

(Continued from preceding page)

Certain witnesses were questioned last Friday, and they did give answers. We were informed by counsel that they were going to take the Fifth Amendment today. We called them in. We talked to them. They said they would take the Fifth Amendment. Then we stressed to them certain duties and obligations of these witnesses. Certain things they should search their own minds and consciences for. Then we left them to do that searching of the conscience.

The Court: You have not talked to them since?

Mr. Coleman: We have not talked to them since.

May I add one thing, your Honor? May I add this, no matter what went on then, it is case law position that the Government, no matter how much a witness may say beforehand that he will take the Fifth Amendment, that you never really know the witness is going to take the Fifth Amendment until he is up on the witness stand, until he has the oath administered to him to tell the truth, before the Judge and jury and the question is put to him. That is case law." (Joint Appendix, pp. 306a-307a).

[4] "Upon review of the cases and hearing the able arguments of counsel, it seems to the Court that this is not the situation in which a mistrial should be granted.

In the first place, in view of what is before me, I can not find that the Government knew what action this witness would take at the time he was called to the stand.

Certain representations, I am told, had been made to him and had been left unanswered.

In addition, I think the cases are clear that the Fifth Amendment cannot be asserted in advance of questions actually propounded.

If the law were otherwise, it would preclude a Court's examination into the reasonableness of the grounds asserted." (Joint Appendix, p. 311a.)

[5] "The Court: Now, ladies and gentlemen of the jury, I want to say something to you at this time for your careful consideration.

The fact that a witness, called by the Government, refuses to answer certain quetsions directed to him, which may have some bearing on the case, should not be construed against the defendant, in any way, since the witness, by so refusing to answer, merely stands upon his constitutional right not to subject himself by self-incrimination to a possible criminal prosecution." (Joint Appendix, p. 316a.)

In no event may the witness refuse to be sworn. *United States v. Romero,* 249 F.2d 371, 375 (C.A. 2, 1957).

Professor Wigmore in his work on evidence says at page 388:

> "The privilege is merely an option of refusal, not a prohibition of inquiry." 8 Wigmore, Evidence, §2268 (3d ed. 1961); 98 C.J.S. Witnesses §436, page 252; *United States v. Benjamin,* 120 F.2d 521 (C.A. 2, 1941); *Mulloney v. United States,* 79 F.2d 566, 581 (C.A. 1, 1935).

The cautionary instruction has been held to cure any error in the calling of the witnesses. *United States v. Romero, supra; United States v. Amadio,* 215 F.2d 605, 614 (C.A. 7, 1954); *United States v. Hiss,* 185 F.2d 822, 832 (C.A. 2, 1950); *Weinbaum v. United States,* 184 F.2d 330 (C.A. 9, 1950).

An erroneous cautionary instruction to the giving of which no objection was made, does not constitute reversible error. *Namet v. United States,* 373 U.S. 179 (1963).

Before a witness is entitled to refuse to answer a question, the danger to be apprehended must be real and appreciable, and not a danger of imaginary and unsubstantial contingency. *In Re Atterbury,* 316 F.2d 106 (C.A. 6, 1963). The privilege extends not only to answers which would incriminate, but also to those which would furnish a link in the chain of evidence needed to prosecute the witness for a federal crime. *Huffman v. United States,* 341 U.S. 479 (1951).

The Government contended that defendant did not have the right to hand pick the witnesses concerning the use of the boat, and it had a duty to resort to all sources of supply with respect to this information. The Government did not claim that it had any information to the effect that these three witnesses had been engaged in any wrongdoing.

The case against the defendant was supported by strong, corroborated evidence. The testimony of the three witnesses in question was not needed.

The defendant's cross-examination of each of these three witnesses was directed largely to the fact that they had told Government counsel that they would take the Fifth Amendment.

Considering the record in its entirety, we do not think that the calling of these three witnesses constituted prejudicial error.

Defendant did not claim that Government counsel was guilty of misconduct. His claim was that the trial judge erred in permitting Government counsel to call these three men as witnesses. We do not believe that the trial judge had the right to preclude either party from calling witnesses. The District Judge had the opportunity to pass upon the issue only when the witnesses were sworn and invoked their privilege.

Government counsel asked only a few questions of each of these three witnesses. The trial judge gave proper cautionary instructions.

Harmon complains about a short excerpt from Government counsel's opening argument to the jury.[6] He made no objection to the argument and any error has been waived. *White v. United States*, 315 F.2d 113 (C.A. 9, 1963). But defendant's counsel answered this argument at great length and again injected the Fifth Amendment issue in the case. Joint Appendix, pages 500(a), 501(a). However, we found no error of which Harmon can complain, in the argument of Government counsel.

Affirmed.

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[6] "Well, let's put this in even a better perspective. What we tried to do after that, ladies and gentlemen, was to call some people who knew what the ordinary, the necessary, the customary conduct of union business was. We tried to call other officers and other business agents and put them on the stand, some of these stewards, and let them tell you the proper story of what union business is.

"And we learned from the ones that [764] testified that a business agent has certain companies that he, himself, supervises. That there are 75 to 80 stewards. That the problems they can't solve in the matter of grievances they take to their individual business agent who is in charge of their company." (Joint Appendix, p. 473a.)

JUDGMENT

Before: Weick, Chief Judge, Cecil, Circuit Judge, and Taylor, District Judge.

Appeal from the United States District Court for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court,
Carl W. Reuss,
Clerk.

(Seal)

A true copy:
Attest: Carl W. Reuss, Clerk.
By: James A. Comb, Deputy Clerk.

STATUTES INVOLVED

29 UNITED STATES CODE

§439. Violations and penalties

(c) Any person who wilfully makes a false entry in or wilfully conceals, withholds, or destroys any books, records, reports or statements required to be kept by any provision of this subchapter shall be fined not more than $10,000.00 or imprisoned for not more than one year, or both.

§501. Fiduciary responsibility of officers of labor organizations—Duties of officers; exculpatory provisions and resolutions void

(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organizations as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

Embezzlement of assets; penalty

(c) Any person who embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both. Pub. L. 86-257, Title V, §501, Sept. 14, 1959 73 Stat. 535.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

* * * * *

PROSECUTOR'S OPENING STATEMENT

(20a) If I may I would like to read a portion of the Thirteenth Count, and, as you remember, the indictment is divided into the first twelve counts which charge embezzlement and the last twelve counts which relate to the entry in the books concerning these expenditures. * * *

* * * * *

(302a) HOFFA, WILLIAM, was thereupon called as a witness herein, and after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Coleman:

Q. Would you please state your name, sir, so the ladies and gentlemen of the jury might hear?

(467) A. William Hoffa.

Q. What is your address, sir?

A. 2615 Kipling.

Q. What is your occupation, sir?

A. Business Agent for the Teamsters Union.

Q. How long have you been a business agent for the Teamsters Union?

A. Fifteen years.

Q. With what local are you presently associated?

A. 614.

Q. Did you say you were a business agent, sir?

A. Well, yes.

Q. What are your duties as a Business Agent?

A. I'm sorry, sir. I refuse to answer that question on the Fifth Amendment.

Mr. Woods: May Mr. Coleman and I discuss certain matters, your Honor, in the absence of the jury?

The Court: Yes, you may.

The jury will be excused, please.

(Whereupon the jury was excused from the courtroom at 9:55 o'clock a.m.)

The Court: All right, gentlemen.

Mr. Wood: I think, gentlemen, that (468) we should know, by way of a preface to anything going any further as to whether or not the Government acknowledges that this witness was going to take the Fifth Amendment, or that he had been advised.

The Court: How about that, Mr. Coleman?

Mr. Coleman: Your Honor, we don't know, the Government's position is that we did not know whether this witness would take the Fifth Amendment until we put each question to him.

The Court: That is not my question, Mr. Coleman.

Mr. Coleman: That was part of your question, Mr. Woods.

The Court: What is your question?

Mr. Woods: Was the Government advised prior to Mr. Hoffa taking the witness stand now that he was relying or would rely on the Fifth Amendment in his testimony.

Mr. Coleman: Your Honor, the Government had received some advice that these gentlemen would take the Fifth Amendment. However, the Government—

Mr. Woods: That answers it.

Mr. Coleman: May I finish? May I complete my statement, your Honor?

(469) The Court: Yes.

Mr. Coleman: However, the Government spoke to these witnesses and reminded them of certain things, and when we last left them, we had not received, we told them to think certain things over, and we had not received an answer.

The Court: You had not received a definitive answer, is that correct?

Mr. Coleman: As far as we are concerned, that is correct.

Mr. Woods: We know now, of course, he doesn't know until the questions are put, one, two, three, four, that he is going to take the Fifth Amendment on a given question as he phrases it in court. But, as I understand the Government, they have been advised, prior to this time this man

took the witness stand, that he was going to take and rely on the Fifth Amendment, and in view of that, your Honor, the defendant asks for a mistrial.

Mr. Coleman: Your Honor, I would like to know what law counsel is relying upon. We have checked the case law on this. The Government has done nothing wrong here.

Mr. Woods: Except trying to run the stigma of the Fifth Amendment plea off on this defendant, (470) of which we are indefensible of asking this witness questions ourselves.

Mr. Coleman: May we be heard on this, your Honor?

The Court: You may.

Mr. Coleman: The Fifth Amendment, as counsel for the defendant would certainly be the first to admit, is protection for the innocent as well as the accused, as the case law says. Instructions from the Court are available on this topic. Certainly people in this walk of life have said that the Fifth Amendment should not be held against anyone. Now they turn around, they are saying that this Fifth Amendment is going to reflect upon the defendant, the very Fifth Amendment that case law says should not be held against anyone.

What is the position of the Government here? The Government has a duty here. The Government has a duty to society. There are certain people involved that know something about this matter. Is it the election of the defendant to pick and choose and say I am going to bring in a half a dozen people here that are going to tell the story I want the jury to hear?

What about these other people that know something about it? Doesn't the Government have the right, (471) doesn't the Government have a duty to bring these people before the jury to get the truth? Isn't a trial to get the truth? We put these people on the stand. If we didn't put these people on the stand, what would the jury think? Why didn't the Government call them? They have the power of subpoena. Why didn't they bring them in here? The Government has a duty and a right to do it. If the Government did not do it, it would hurt the Government's case.

The case law on this is clear, it says there has to be overwhelming reasons for the witness to take the Fifth Amendment. It has to be asserted to each and every question. It can't be a blanket refusal before they take the stand.

In a recent case where one noted Judge pointed out, how can anyone anticipate how a witness will react once he receives the legal oath before a Judge and jury? No one can predict that.

Your Honor, we submit the Government has acted according to the law laid down by precedent and tradition. We submit the Government has acted within the dictates of its duty and within the best dictates of prosecution your Honor.

Mr. Woods: In 262 F(2) 535, where Judge Learned Hand had this problem on appeal, he pointed out, your Honor, that when the Government knows that a witness (472) that they propose to put on the witness stand, and know in advance that this witness is going to take the Fifth Amendment, that the defendant is stripped and is put in an indefensible position. I claim that that is exactly the position in which we find ourselves now.

It is true, every evidence, all the evidence that goes in prejudices the defendant. It's calculated to, certainly. We are not talking about that kind of evidence. We are talking about that kind of evidence against which the defendant is rendered indefensible. The stigma of the Fifth Amendment on a Business Agent of 614. They knew he was going to take the Fifth. They know it is going to rub off on this defendant, and he has no way to defend himself against it. It has denied us the right of cross-examination of this witness, by his taking the Fifth Amendment, and the Government knew it before they put him on the witness stand.

Mr. Coleman: The case that counsel cites, your Honor, is authority for our position. The case of U.S. v. Maloney, 262 F(2) 535, says it is perfectly all right to ask a witness, even if the Government knows, that the trial court can give a cautionary instruction. Counsel did not mention that when he was citing the case.

The Court: Do you have that case here? (473) Do you have the case here, 262 F(2)?

Mr. Woods: No, I do not. I didn't anticipate this.

I didn't think the Government, let me ask this: Did this witness testify in front of the Grand Jury, and what did he do in front of the Grand Jury? Let's find out how long the Government has known about the Fifth Amendment?

Mr. Coleman: Is your Honor ordering the Government to disclose what occurred in the Grand Jury?

The Court: Not yet.

Mr. Woods: I am not asking what the testimony was either. I am just asking if he took the Fifth Amendment.

Mr. Coleman: I believe that comes within the prohibition of the secrecy of the Grand Jury.

The Court: I would like to see this case 262 F(2) that both parties have relied upon.

Mr. Coleman: Your Honor, may we cite also 209 F(2) 225, a First Circuit case. Marcello v. U.S., 196 F(2) 437: Hoffman v. The United States, 341 U.S. 479. I believe there is another case, Namet from the First Circuit, where a cert was denied on this question by the United States Supreme Court.

The Court: Gentlemen, your point, Mr. (474) Woods, is that the basic proposition you are asserting is that the Government knew that this witness was going to take the Fifth Amendment before he took the stand?

Mr. Woods: That is right, that an instruction will not cure—

The Court: Just a minute.

Government's counsel informs the Court that they did not know whether he was going to take the Fifth Amendment before he took the stand.

Mr. Woods: That isn't what he said, your Honor. He said he did know. He was advised by this witness.

The Court: Let's get it clear.

Mr. Coleman: Your Honor, this is the Government's position. I cannot tell the whole position, your Honor, without violating the Grand Jury Rule. So I will eliminate part of my answer.

The Court: All right.

Mr. Coleman: I will talk just about certain matters.

Certain witnesses were questioned last Friday, and they did give answers. We were informed by counsel that they were going to take the Fifth Amendment today. We called them in. We talked to them. They said they would take the Fifth Amendment. Then we stressed to them certain (475) duties and obligations of these witnesses. Certain things they should search their own minds and consciences for. Then we left them to do that searching of the conscience.

The Court: You have not talked to them since?

Mr. Coleman: We have not talked to them since.

May I add one thing, your Honor? May I add this, no matter what went on then, it is case law position that the Government, no matter how much a witness may say beforehand that he will take the Fifth Amendment, that you never really know the witness is going to take the Fifth Amendment until he is up on the witness stand, until he has the oath administered to him to tell the truth before the Judge and jury and the question is put to him. That is case law.

Mr. Woods: That doesn't cure the defect, your Honor. We have been stripped of our right to cross-examine a witness, and I think that is violative of every constitutional and due process things we have ever known. An instruction will not cure it. In spite of searching his conscience, as he was advised by Mr. Coleman, it boils down to the fact that he was told that this witness would take the Fifth Amendment.

(476) Mr. Coleman: May I ask defense counsel if he was advised this witness would take the Fifth Amendment?

Mr. Woods: Mr. Hoffa, have you ever seen me in your life?

A. No, sir.

Mr. Coleman: That is not responsive to the question.

Mr. Woods: Prior to today?

A. No.

Mr. Coleman: That is not responsive to the question. Was counsel advised he was going to take the Fifth Amendment by anyone?

The Court: Do you want to answer the question?

Mr. Woods: I don't think I have to. This man isn't my witness.

Mr. Coleman: The point being, your Honor, that this objection could have been anticipated.

Mr. Woods: You tell me, Mr. Coleman, how any kind of anticipation is going to put in my pocket cross-examination of this witness?

Mr. Coleman: The objection could have been made before the question was asked if you were advised of this, Mr. Woods.

(477) The Court: Now, will you mark in this case, please, the portion to which you have reference? The case is rather long.

Mr. Coleman: Your Honor, may I make one other point?

The Court: Yes.

Mr. Coleman: We don't know that the witness has asserted the privilege correctly. That is something the Court has to rule upon.

The Court: That is correct.

Mr. Coleman: I believe it is at Page 537, your Honor.

Mr. Woods: It's the footnote.

The Court: Mr. Woods, do you have any other cases to which you wish to call the Court's attention?

Mr. Woods: No, sir.

I would like to read those two cases that Mr. Coleman cited.

The Court: I think under the circumstances, gentlemen, that we will take a short recess and read some cases.

(Whereupon a short recess was taken.)

The Court: Well, now that you gentlemen have had a chance to review the authorities a little more, (478) and I take it, collect your thoughts, I am going to ask the parties to summarize for the benefit of the Court their conclusions up to the present time.

You, Mr. Woods, have moved for a mistrial.

Would you elaborate the grounds for your motion?

Mr. Woods: Most of it, your Honor, would just largely be a repeat of what I have said to you earlier.

I have submitted to your Honor those additional cases which I think bear out my position that it is improper, it

creates an aura that is prejudicial to this defendant, his right of confrontation and cross-examination of these witnesses has been emasculated from him. It has created an aura that cannot help but—

The Court: Of course, there is no point in your—you lose nothing in cross-examination if he hasn't answered anything on direct examination. What is your point there?

Mr. Woods: Wait a minute, how can I cross-examine him if I am going to get the Fifth Amendment from him? He is taking the Fifth Amendment in the first instance is what rubs off on this defendant.

The Court: Of course. if the Fifth Amendment is sustained, there has tbeen no testimony.

(479) Mr. Woods: Sir?

The Court: If the Fifth Amendment claim is sustained, there would be no testimony.

Mr. Woods: This is not the place to test his reliance on the Fifth Amendment as being justified or not justified, however.

The Court: Well, that is a point we will get into eventually, possibly.

Now, do you want to add anything?

Mr. Woods: Well, these three cases, your Honor, I think, are right on the money, as it were, and I drew the Court's attention to them.

The Court: Thank you.

Mr. Coleman?

Mr. Coleman: Your Honor, again we would stress, one, as your Honor has pointed out, there hasn't been any testimony as yet.

Two, we don't even know if the claim of the Fifth is proper.

Three, there are just so many people that know about this boat. A lot of them were people around the defendant.

The position the defense is trying to place us in is that they will select the people who will (480) come in and will be asked questions about this, and the question for the jury is what about all these other people?

I think the Government has a right and a duty to call these people to the stand. We don't know whether they are going to take the Fifth Amendment until the question

is put to them, and under the case law, as it has been stated previously by the Government, the Judges point out that when the oath is administered in open court, the solemnity of that occasion before the jury and the Judge, that is the only time when the questions can be put, that you can determine whether a witness is going to take the Fifth Amendment.

The Court: All right, gentlemen, the Court is ready to rule. I don't want to cut you off. Either party can add anything he wants, be sure everything is on the record.

Mr. Coleman: Your Honor, just one further thing. The additional cases that Mr. Wood cited to the Court during the recess—he also gave the citations to the Government, and Mr. Merrill was able to read those cases, and I believe he has some comments to call to the Court's attention.

The Court: All right.

Mr. Merrill, the Court will be pleased (481) to hear from you.

Mr. Merrill: With respect to the case cited by Mr. Woods, Tucker v. The United States, 267 F(2), I think that that case is clearly distinguishable because there the Court said where a witness had taken the Fifth Amendment in the first, a first trial—

The Court: Was that the case where there had been three trials, on the third trial?

Mr. Merrill: Yes, sir. They were admonished on the third trial that they shouldn't call these witnesses who, on the second trial, had just taken the Fifth, when the Government must have known or had no reason to doubt that they wouldn't take it, since they had taken it in the first trial, so I think that would be distinguishable from what we have here and in no way inconsistent with Mr. Coleman's remarks.

As far as the case that is cited at 215 F(2), the Amato case, I think on Page 614, it is made clear by the Court's decision that if there was any error, it could be cured by a cautionary instruction, which is what we relied on previously in citing the Maloney decision at 262 F(2) 535.

The last case that was cited by Mr. Woods to us, in any event, was 179 F(2) 519. That is a (482) case that came out of the Second Circuit sometime prior to Judge Hand's

decision in the Maloney case, and I think the Maloney case would be the last word on that; from that Circuit, in any event.

The Court: Thank you, Mr. Merrill.

Mr. Woods: Thank you, sir.

The Court: All right, gentlemen.

Upon review of the cases and hearing the able arguments of counsel, it seems to the Court that this is not the situation in which a mistrial should be granted.

In the first place, in view of what is before me, I cannot find that the Government knew what action this witness would take at the time he was called to the stand.

Certain representations, I am told, had been made to him and had been left unanswered.

In addition, I think the cases are clear that the Fifth Amendment cannot be asserted in advance of questions actually propounded.

If the law were otherwise, it would preclude a Court's examination into the reasonableness of the grounds asserted.

I also point out to you that in certain of the cases to which reference has been made, the questions (483) propounded touched the vital elements of the charge, and there might have been some grounds—I say might have been some grounds—for the jury's inferring that certain answers might be made. That was not the case here. These were preparatory questions, so in view of these facts, the motion for mistrial will be denied.

Mr. Woods: Now, my next question, your Honor, is that we should have an offer of proof or information to the Court to show how this proper rebuttal testimony before we go any further, compounding hearing a witness repeat, who is a Business Agent in 614, of which this defendant is the Secretary-Treasurer, the Fifth Amendment, the Fifth Amendment, the Fifth Amendment, and I presume, without knowing, that this is not going to be only the first one.

The Court: Well, that is something—

Mr. Woods: But that is speculative, I appreciate that. We aren't to that point yet.

The Court: It is speculative, yes.

Mr. Woods: Let's find out what the offer of proof is, what there is for this witness to rebut. His whole testimony might not even be proper rebuttal. It may well have been proper testimony for a case in chief, if it has any merit at all.

Mr. Coleman: Does your Honor wish us (484) to make a proffer at this time?

The Court: If you will.

Mr. Coleman: Your Honor, the defense that Mr. Woods has made in behalf of his client has been that this boat was used for union purposes, and it was a good faith use of the boat, and, therefore, that the funds were not embezzled.

Well, we think that the Government is entitled to inquire into other people who were officers, in positions of responsibility, on this boat, and find out whether they knew that the boat was being used for union purposes, whether they had been on it.

This is clearly, your Honor, we submit, rebuttal.

The Court. As I recall it, Mr. Hoffa was one of the names mentioned to the Court and jury as having been on the boat for union purposes at certain times, the precise dates of which were not known; am I correct in that?

Mr. Coleman: I don't believe so, your Honor.

Mr. Woods: I think the testimony, as I recollect it, your Honor, is that Mr. William Hoffa, per Mr. Dohany's testimony was he thought he had been on Mr. (485) Dohany's boat, which was out by the boat Mr. Harmon was using, but he had no knowledge of whether or not Mr. Hoffa was ever on that boat.

However, within the context of your Honor's earlier remarks when you denied my motion for mistrial, these very questions that Mr. Coleman has now told us that he is inquiring into do just exactly as you said. They go right to the core and are material. I don't concede that it is proper rebuttal, testimony for rebuttal, at the tail end of the Government's case, but it does go to the core, and you can see what this is going to do to this defendant.

The Court: Well, I think the references in the cases to going to the vital elements of the charge were much more closely related than at present appears.

I am going to deny, as I say, the motion for mistrial, and I will ask counsel for the Government, now, what is your next step? Are you going to put this witness back on the stand?

Mr. Coleman: Yes, your Honor, we intend to put him back on the stand and inquire of him along the lines we have outlined to the Court.

Mr. Woods: As long as the defense position is clear, that every single time a question is asked (486) and the Fifth Amendment, I think we are committing reversible error and prejudicing this defendant.

The Court: Your objection is noted.

Mr. Coleman: Your Honor, we might add that the Government would request even a cautionary instruction, as the cases cited.

The Court: Well, of course, a precautionary instruction will be given, but you may proceed with your case.

Mr. Coleman: Thank you, your Honor.

Mr. Woods: The record is clear, once again, that my objection goes, even though the Court attempts to give a precautionary instruction, because I do not feel that will cure the defect, and may I have a continuing objection, then?

The Court: You may.

(Short intermission.)

Mr. Woods: May I suggest, before the Government continues, that—

The Court (interposing): Just a minute. I think Mr. Coleman is otherwise occupied.

Mr. Woods: Excuse me.

The Court: Now, Mr. Coleman, your attention, please, if you would.

(487) Mr. Coleman: Yes, your Honor.

Mr. Woods: May I suggest to the Court that defense counsel, at this juncture, before there is any possibility of a repeat of the claim of the Fifth Amendment ask two or three questions to find out whether or not the Government

was advised that this witness would take the Fifth Amendment if called as a witness in this case.

The Court: Aren't you a little late on that?

Mr. Woods: I don't think so.

The Court: We have heard from Mr. Coleman that he was not so advised.

Mr. Woods: No. I heard from Mr. Coleman that he was advised, your Honor. And Mr. Coleman told us in addition that he told him, "You better go search your conscience." That doesn't detract from what he was told by this witness.

The Court: Following which there was no reply. Am I correct on that?

Mr. Coleman: Following the statement to the witness that this is up to you people, that you should search your consciences in this regard, they were dismissed, then, and there was no reply.

The Court: And subsequent to that there (488) was no reply. Do you challenge that?

Mr. Woods: Yes, sir, I do. Whoever makes the parting remark doesn't determine the context in which the—the import in which the interview was left.

Mr. Coleman: Excuse me. Is Mr. Woods challenging my statement?

Mr. Woods: Oh, no. I am not. You know better than that, Mr. Coleman.

Mr. Coleman: That was the question asked. It is on the record that way. I just wanted to clear that up.

Mr. Woods: I am challenging the fact that Mr. Coleman's remarks to him, "Search your consciences," are not material at all. If he says he said it, I know he said it.

Mr. Coleman: Your Honor, may I direct myself to this?

The Court: Yes.

Mr. Coleman: That was what was said, and there was no comment. But I believe this is all immaterial to what the law is on this subject. And that is that you don't know what the witness is going to do until after he has been sworn, takes the stand before the Court and jury, and the question is put to him.

(489) That is what the law is.

Mr. Woods: The cases say "he has reason to believe," your Honor.

The Court: Do you wish to challenge Mr. Coleman's statement that he knew, prior to putting this witness on the stand, from the witness, that after his observation that he should search his conscience, that he was told that the Fifth Amendment would be taken?

Mr. Woods: I am not sure I understand exactly what you say. But I think I know what Mr. Coleman said, and that was after Mr. Coleman said to Mr. Hoffa, "Go search your conscience," and those remarks in that fashion, he has inferred to me that Mr. Hoffa said nothing further to him, and I certainly don't challenge that.

The Court: All right.

Mr. Woods: But I am suggesting his remarks to Mr. Hoffa had no materiality at all after he had been advised that Mr. Hoffa had said his last word.

The Court: All right. If you don't challenge that, then we will proceed.

Bring in the jury.

(Whereupon the jury returned to the courtroom at 11:15 o'clock a.m., all members present.)

(490) Mr. Coleman: May I proceed, your Honor?

The Court: You may.

Q. (By Mr. Coleman): Mr. Hoffa, what are the duties of a Business Agent?

A. I respectfully refuse—decline to answer on the Fifth Amendment of the United States for fear of self-incrimination.

The Court: Excuse me. Read me back that last answer, please.

(Last answer read by the reporter as follows:

"A. I respectfully refuse—decline to answer on the Fifth Amendment of the United States, personal crimination.")

A. I said "for fear of self-incrimination."

The Court: What is that?

A. For fear of self-incrimination.

The Court: Now, ladies and gentlemen of the jury, I want to say something to you at this time for your careful consideration.

The fact that a witness, called by the Government, refuses to answer certain questions directed to him, which may have some bearing on the case, should not be construed against the defendant in any way, since the witness, by so refusing to answer, merely stands upon his (491) constitutional right not to subject himself by self-incrimination to a possible criminal prosecution.

Now you may proceed, Mr. Counsel.

Mr. Coleman: Thank you, your Honor.

Q. (By Mr. Coleman, continuing): How long have you been a Business Agent, Mr. Hoffa?

A. I repeat, 15 years, about.

Q. And do you know whether or not the boat was used by the defendant for union business?

A. I still respectfully refuse—decline to answer on the Fifth Amendment of the United States for fear of self-incrimination.

Mr. Coleman: That is all the Government has.

The Court: All right.

Do you have anything, Mr. Woods?

Cross Examination

By Mr. Woods:

Q. Were you called as a witness in the year 1962, the spring, in the case of United States v. Floyd Harmon, before the Grand Jury of the Eastern District of Michigan, sitting in the Federal Building in Detroit, Michigan?

Mr. Coleman: Objection, your Honor.

The Court: On what ground?

Mr. Coleman: May we come to the bench?

(492) The Court: You may. Do you want the reporter?

Mr. Coleman: Yes, please.

(The following proceedings were had at the bench, out of hearing of the jury):

Mr. Coleman: Your Honor, this is my concern: If the witness answers this question—

The Court (interposing): Whether or not he came before the Grand Jury?

Mr. Coleman: Whether he came before the Grand Jury or not. The Government is concerned about the rule of secrecy in the Grand Jury, and whether or not the Government can come forward with this line of questioning should the inference be raised that there was some impropriety on the part of the Government in having called him before the Grand Jury and then calling him again.

That is all the Government is concerned about.

Mr. Woods: That goes to the—

Mr. Merrill (interposing): This witness was not bound by any secrecy.

Mr. Woods: So that there is no misunderstanding and so that we won't be running up here again, my (493) next question is this: Did you take the Fift Amendment in front of the Grand Jury?

My next question is this: Within the past three to five days time, did you advise the Government that you would take the Fifth Amendment if called in the case of United States v. Harmon?

The Court: All right. There will be no objection, and I think these are proper questions.

(The following proceedings were had in open court in the presence and hearing of the jury):

The Court: All right, gentlemen, are we ready to continue.

Mr. Woods: Would you repeat the question, please?

(Last question read by the reporter.)

A. Yes, sir.

Q. (By Mr. Woods): Did you take the Fifth Amendment before that Grand Jury?

A. Yes, sir.

Q. Today, prior to coming into court, or within the past three days, have you advised the Government that you would take the Fifth Amendment if called as a witness in this case?

A. Yes, sir.

(494) Q. And was that advice under advice of counsel?

A. Yes, sir.

Mr. Woods: That is all.

The Court: All right, Mr. Coleman.

Re-direct Examination

By Mr. Coleman:

Q. Before you took the Fifth Amendment or strike that, please.

During the Grand Jury session that has been referred to by the defense counsel, did you answer some questions without resorting to the Fifth Amendment?

Mr. Woods: I think it is immaterial, your Honor.

The Court: Well, we will see what it is going to bring out here. You opened the door on this Grand Jury business.

Go ahead. Ask your question.

A. Yes, sir.

Q. (By Mr. Coleman): During the Grand Jury proceeding that has been referred to by the defense counsel, did you ask certain questions without resorting to the Fifth Amendment?

A. Yes, sir. But after a lot of consideration I think I was wrong in a lot of things I answered.

Q. And did you answer questions concerning this boat?

Mr. Woods: I have another objection, (495) you Honor. I think he is trying to impeach his own witness at this point. Leading. Trying to impeach his own witness.

Mr. Coleman: Your Honor, we would, first of all, ask that this witness be declared a hostile witness for obvious reasons, and that we be allowed to—

The Court (interposing): I think under the circumstances, gentlemen, it is clear that this witness may be cross-examined on leading questions to be asked.

Proceed.

Mr. Coleman: Would you read the last question back, Mr. Reporter, if you please?

(Last question read by the reporter.)

A. I refuse to answer on the ground of the Fifth Amendment.

Q. (By Mr. Coleman): Do you know what boat I am referring to?

A. I imagine the boat on that chart there.

Mr. Coleman: The witness has referred to Govern-

ment's Exhibit 32-B, which is in sight in the courtroom. May the record reflect that.

Q. (By Mr. Coleman): Did you, on last Friday, in the Federal courthouse in which you are presently in, did you at that time answer certain questions about this boat?

A. Again, I refuse to answer on the ground of the Fifth Amendment.

Q. Do you remember last Friday—strike that, please.

(496) Mr. Coleman (continuing): The Court's indulgence a moment.

(Short intermission.)

Q. (By Mr. Coleman): Do you remember last Friday saying you didn't know anything about this boat?

A. I respectfully refuse to—decline to answer the question on the ground of the Fifth Amendment, for fear of self-incrimination.

Q. Do you know Edwin Dooley, Compliance Officer of the Bureau of Labor Management Reports?

A. I respectfully decline to answer the question on the ground of the Fifth Amendment.

Q. Do you remember talking to Mr. Dooley about the boat?

A. I respectfully decline to answer the question.

Q. Do you remember telling Mr. Dooley that Harmon had been told to get rid of the boat before he gets everybody in trouble?

A. I respectfully decline to answer the question.

Mr. Coleman: That is all, your Honor.

The Court: All right.

Mr. Woods: No questions. My objection to this whole testimony has been noted.

The Court: It stands. It has been noted.

* * * * *

(340a) ORSINI, FRANK A., a witness called by the Government in rebuttal, having been first duly sworn by the Clerk, testified as follows:

The Clerk: What is your full name, please?
A. Frank A. Orsini.
The Reporter: Is that O-r-s-i-n-i?
A. Yes. O-r-s-i-n-i.
The Clerk: Take the stand, sir.

Direct Examination

By Mr. Coleman:

Q. Mr. Orsini, would you please state your full name for the ladies and gentlemen, so they might hear?
A. Frank A. Orsini.
(530) Q. What is your address, sir?
A. 2220 Coe Court.
Q. And are you connected with Local 614?
A. Yes.
Q. And what is your position with Local 614?
A. I am an organizer.
Q. And what was your position with 614 in 1958, '59 and '61?
A. I refuse to answer that on the ground it might incriminate me, under the Fifth Amendment.
Mr. Woods: My objection, your Honor. I trust, rather than reiterating all of them, my objections, as per former witness, Mr. Hoffa, may stand for this witness.
The Court: I take it the same objections apply?
Mr. Woods: Yes, sir.
The Court: That were outlined to the Court herefore.
Mr. Coleman: I take it the same replies are made that were made before?
Mr. Coleman: Yes, your Honor, they are.
Mr. Woods: The same rulings, I presume?
The Court: The same ruling will be made, and the same precautionary admonition to the jury. You (531) recall that the witness's exercise of his constitutional rights under

the Fifth Amendment is not to be taken against the defendant in nay way.

Q. (By Mr. Coleman): Mr. Orsini, were you a trustee in 1959, '60 and '61?

A. I refuse to answer that under the Fifth Amendment.

Q. Did you refuse to sign the books of Local 614 because the defendant did not give you certain receipts?

A. I still have to refuse to answer it under the Fifth Amendment.

Q. Do you know whether or not the defendant incurred union expenses on a boat which he used for his personal use?

A. I will still have to stand on the Fifth Amendment. I told you this morning.

Mr. Woods: I would have a further objection to the last question, in the manner in which the question is framed. It presumes a conclusion that amounts to a usurpation of a determination of the ultimate fact by the jury.

Mr. Coleman: Your Honor, I believe it is a legitimate question.

The Court: I think the question is proper.

Mr. Coleman: No further questions, your Honor.

Cross Examination

By Mr. Woods:

(532) Q. Mr. Orsini, prior to coming in this courtroom this afternoon, and having appeared as a witness, did you advise the Government counsel in this case that you would take the Fifth Amendment if called as a witness in this case?

A. Yes.

Q. Did you do that under the advice of counsel?

A. No, of my own free will.

Mr. Woods: All right. Thank you. That is all.

Re-direct Examination

By Mr. Coleman:

Q. Mr. Orsini, did you speak to me last Friday in this Federal courthouse?

A. I still take the Fifth Amendment.

Q. Did you tell me at that time you didn't know anything about this boat?

A. I still take the Fifth Amendment.

Mr. Coleman: Nothing further, your Honor.

The Court: Anything further, gentlemen?

Mr. Woods: No. Just a minute.

Re-cross Examination

By Mr. Woods:

Q. Did you advise Government counsel today, before you came in, (533) you would take the Fifth Amendment if called today?

A. Yes.

Mr. Woods: That is all.

Mr. Coleman: Mr. Goodsell.

The Court: Pardon?

Mr. Coleman: Mr. Goodsell, your Honor, we are calling the next witness.

Mr. Woods: Mr. Orsini may be excused?

Mr. Coleman: Yes.

The Court: You may be excused.

(Whereupon the witness was excuused.)

The Court: I take it that it is established on the record, though, that the same sequence of events as to this witness, as to the Fifth Amendment, occurred, as to the last one?

Mr. Coleman: Yes.

The Court: We need not repeat that discussion.

Mr. Coleman: No, your Honor.

The Court: All right.

Mr. Coleman: That is my understanding.

* * * * *

(345a) BUSH, ALVY, a witness called on behalf of the Government in rebutal, having been first duly sworn by the Clerk, testified as follows:

Direct Examination

By Mr. Coleman:

The Clerk: What is your full name, please?

A. Alvy Bush.

The Court: Will you spell your name?

A. A-l-v-y B-u-s-h.

The Clerk: Take the stand, please.

Q. (By Mr. Coleman): Would you please state your name, sir, so that the ladies and gentlemen of the jury might hear you?

A. Alvy Bush.

Q. And what is your address, sir?

(539) A. 300 Plumstead, Pontiac, Michigan.

Q. I am sorry. I think you are going to have to speak up.

A. 300 Plumstead, Pontiac, Michigan.

Q. And are you connected with Local 614, sir?

A. I work for them.

Q. And what was your position with Local 614 during the years 1959, '60 and '61?

A. I was Vice President.

Q. Do you know the defendant, sir?

A. I respectfully decline to answer on the ground of self-incrimination.

Mr. Woods: Objection, your Honor.

The Court: The objection is noted upon the record. And I take it from counsel that we have the same sequence covering the events respecting this witness's testimony that we had with Mr. William Hoffa?

Mr. Coleman: Yes, your Honor, we do.

The Court: Very well. I will make the same ruling, Mr. Woods.

Mr. Woods: All right.

The Court: And I will repeat my admonition to the jury.

Mr. Woods: I think it might well, your Honor, be important for the Court, in fact, to repeat its (540) admonition to the jury.

The Court: I would be happy to.

Mr. Woods: The lawyers' objections are one thing. Admonitions to the jury are another.

The Court: I think your point is well taken.

Ladies and gentlemen of the jury, I admonished you this morning in connection with the testimony of Mr. William Hoffa that a witness has a constitutional right to refuse to answer questions which, in his judgment, will incriminate him or subject him to criminal prosecution.

Now, the fact that a witness does this in a trial is not to be taken against a defendant in any way. This is a witness's privilege which he is exercising. It is not to be construed against the defendant. That is the substance of the admonition I gave you this morning.

Mr. Woods: If I may, your Honor, I must object to, I think, an oversight in your Honor's language in this admonition, when you presumed, I felt, by the manner of the admonition that to answer the question would incriminate him. I believe the privilege is predicated on the fact that it may tend to incriminate him.

The Court: I think your point is well taken. There is no position on the part of the Court that (541) it necessarily would incriminate him. The point is that it might. that is all.

Now, call your next witness.

Mr. Coleman: Your Honor, we still have some questions, if we may.

The Court: All right, go ahead.

Q. (By Mr. Coleman, continuing): Were you ever on the boat with the defendant?

A. I respectfully decline to answer the question on the grounds it might tend to incriminate me.

Q. Did you know that the defendant had a boat which he used for his personal use and charged the expenses to the union?

A. I respectfully decline—

Mr. Woods: Objection, please, Mr.—what's your name?

A. Bush.

Mr. Woods: Bush, excuse me. I once again, in addition to my previous objections which have been noted, object to the form of this question, because it presumes a conclusion here, the ultimate fact in this case.

The Court: Mr. Coleman?

Mr. Coleman: I think it is a legitimate question, your Honor.

The Court: Let me have the question (542) read back, please.

(Whereupon the record was read as follows

"Q. Did you know that the defendant had a boat which he used for his personal use and charged the expenses to the union?")

Mr. Coleman: Your Honor, may I amend that?

The Court: You may amend it.

Q. (By Mr. Coleman, continuing): Do you know whether or not the defendant used a boat for his personal use and charged it to the union?

A. I respectfully decline to answer any question under the Fifth Amendment on the grounds that it might tend to incriminate me.

Mr. Coleman: I believe that is all, your Honor.

The Court: All right.

Mr. Woods?

Mr. Woods: I move to strike the entire testimony.

The Court: On the same grounds?

Mr. Woods: Same grounds.

The Court: Same ruling.

(543) Call your next witness.

Mr. Woods: No, I am sorry, I have some questions, please.

Cross Examination

By Mr. Woods:

Q. Had you advised, Mr. Bush, Government counsel today prior to taking the witness stand that if you took the witness stand you would take the Fifth Amendment in this case?

A. Yes, I think I did.

Q. Did you do that under advice of counsel, sir, or was that—

A. I had talked to my counsel.

Q. That is all, thank you, sir. Have you ever seen me before today?

A. This morning.

Q. Have you ever talked to me prior to right now?

A. You are Coleman, aren't you?

Mr. Woods: That is all, thank you.

Re-direct Examination

By Mr. Coleman:

Q. Do you remember talking to me, Mr. Bush, on Friday here in this Federal courthouse?

A. You got me confused. I think you are Coleman, you are the one I talked to.

Q. Did you answer that question?

(544) A. I said if you are Coleman, you are the one I talked to.

Q. Did you talk here on Friday in this courthouse?

A. Yes, sir.

Q. And did you indicate to me at that time that you didn't know anything about this boat personally?

A. Well, I take the Fifth on that answer there.

Mr. Coleman: That is all, your Honor.

Mr. Woods: Thank you.

The Court: The witness may be excused.

(Whereupon the witness was excused.)

Mr. Coleman: The Government calls Mr. Leaun Harrelson, your Honor.

HARRELSON, LEAUN, was thereupon called as a witness herein, and after having been first duly sworn, was examined and testified as follows:

Mr. Coleman: Your Honor, out of fairness to Mr. Woods, I think we have a matter to discuss with you at the bench.

The Court: Approach the bench, please.

Mr. Reporter, please take this.

(The following proceedings were had outside the hearing of the jury.)

Mr. Coleman: Your Honor, this witness, (545) I thought we should call to the Court's attention, in fairness to Mr. Woods, because he stands in a different position than the other three witnesses who took the Fifth Amendment. He was not present this morning with the three of them and did not hear the remarks that we made explaining how that arose.

We spoke to him this afternoon at the luncheon recess when he came in in response to calls of ours and a subpoena.

He has informed us, your Honor, that he will take the Fifth Amendment and that he will take it in this form: "I am taking the Fifth Amendment—"

Strike that.

He will say, he has informed us, at any rate, that it is his intention to say: "I refuse to answer this question because I am under indictment, Federal Grand Jury indictment," or words to that effect, "and therefore I feel it would tend to incriminate me."

Is that a fair recollection, Mr. Merrill? Mr. Merrill was present at the conversation. We tried to dissuade him from saying the words, "I am under indictment," because we felt that it might reflect on the defendant, this part of it.

Now, your Honor, for the Court's (546) information, there has been testimony to the effect that Mr. Harrelson is President of Local 614, and, as Government counsel, I would like to inform the Court that he is presently under indictment for embezzlement under 501C of the Landrum-

Griffin Act, and also for false entry under 439C, two counts each, and is due to be tried in Federal Court, which trial is presently set for next week.

Mr. Merrill: For a different embezzlement.

Mr. Coleman: It is not arising out of the same series of events that the present trial is. It is not concerned with this boat, the charges against Mr. Harrelson.

We tried to dissuade Mr. Harrelson from using the words, "I am under indictment," however, his attorney was not able to be present this afternoon in Court, and his attorney has instructed him to use those words, and Mr. Harrelson will not vary from those words, so I told Mr. Harrelson, Mr. Merrill and I both told Mr. Harrelson that we would take it up with your Honor about the use of the words: "I am under indictment," and that perhaps it could be put on the record without the hearing of the jury.

We feel, however, your Honor, according to the case law that we cited this morning, that (547) again the Government cannot be said to know that a witness is going to take the Fifth Amendment until the question is put to him after he has been administered the oath, and we feel that that is supported by case law.

We have other indications also at other times prior to the witness's conversations with us that I cannot get into at this time, unless the Court would order me, and that again is in reference to the references I made this morning.

The Court: I don't understand your last remark.

Mr. Coleman: Certain Grand Jury testimony.

The Court: I see, all right.

Mr. Woods: I think if the Court ever needed a perfect example of a snowball going downhill and what happens when you let the Government come here before this Court and tell this Court that they know, they have been informed what the witness is going to say, and they have more than ample reason to know what he is going to say, and then to permit the Government to put him on, does nothing but inflame this jury against this defendant, and to do it under the guise or the heady excuse that he is President of Local 614 doesn't remove the stigma that is (548) going to be attached to this defendant.

Mr. Coleman: Your Honor, I object to the characterization of this as a guise. I think it is a legitimate—

Mr. Woods: The reason.

Mr. Coleman: —proper rebuttal.

The Court: Well, let me ask you this question: This case differs from the others in this respect, this witness's situation differs from the others in this respect: Here you have had a definite information prior to trial without any talk by you, their taking it under advisement or anything of that sort, that he is going to take the Fifth Amendment; furthermore, that he is under indictment. He insists that he is going to say that he is under indictment for offenses against the same act for which the defendant is being tried, and he is president of the local of which the defendant is secretary-treasurer.

I am inclined to exclude all testimony from this witness on the ground that it would be so detrimental to the defendant that it could not possibly be overcome.

Mr. Coleman: Very well, your Honor.

May I say this, though, the Government felt that in bringing forth this witness, they were again establishing proper rebuttal, in that as President he would (549) be in the unique position to know what are the various expenses incurred by the union.

The Court: Yet you are informed, Mr. Coleman, by the witness himself, if I understand what you presented to me correctly, that he is not going to say a word.

Mr. Coleman: Yes, we did, your Honor, this afternoon. There is other information that I think brings out a fuller picture, your Honor, that I am not at liberty to disclose without your order, but, your Honor, I do want to say this, this is bearing on our good faith, that we did feel that he had a legitimate rebuttal purpose in this case.

I do have other information that I could disclose to the Court upon order, and also, your Honor—just let me gather my thoughts here a second—that the case law supports us in the position that you do not know when the witness is going to take the Fifth until the question is put to him under oath.

The final thing I would like to point out, your Honor, is that we brought the matter to your Honor because we realized that your Honor was drawing a distinction this morning surrounding the conversation. That is why we are up here, your Honor.

The Court: The distinction I am drawing, (550) of course, is the one between a witness who flatly tells you immediately before trial that he is not going to testify, and a witness who has been admonished as to the consequences and may change his mind and has gotten in touch with you since.

I think it is proper to exclude the testimony of this witness. You will gain nothing by it. He is not going to talk, from all we know, and can only react detrimentally to the defendant.

Mr. Woods: I might say, your Honor, I certainly accept your Honor's ruling to exclude him, but I might point out that I have a continuing objection for a mistrial here on the basis of my arguments that have been previously put on the record, that the only real difference I can see between what Mr. Coleman has advised the Court now and earlier is that this man is going in on his own, because I have never seen or talked to him before.

The Court: Of course, there is another very essential difference I might point out here between this case and the other, and that is, this man's determination as reported to me is that he is going to state that he is under indictment. That is a factor that we did not have present in the other cases.

I am not indicating at the present time (551) what my ruling would be if we were completely without that factor, but that is one of the factors that has influenced my judgment here.

Mr. Merrill: That is why we wanted to bring it to your Honor's attention.

The Court: I am going to exclude it.

Mr. Woods: My motion for a mistrial is by the mere fact that he has been called.

Mr. Coleman: Would there be any point in asking this witness out of the presence of the jury these questions now that he has been put under oath?

Mr. Woods: You have already been told what he is going to say.

The only thing I can tell you, if you do this, this one other factor that I take it the Court feels would be inflammatory will be put right out here for these newspapermen to pick up and put in the papers, and I don't think we need to kid ourselves, the jury is going to read about it.

Mr. Coleman: Your Honor, I don't think the last fact is really pertinent. One thing, instructions are in this, it has been held, will cure prohibitions against reading the newspapers.

The Court: Your request, then, is to (552) ascertain out of the presence of the jury whether or not he is going to adhere to his professed determination to take the Fifth Amendment?

Mr. Coleman: Yes, your Honor.

The Court: And your theory seems to be the cases which say that it will not be presumed a witness is going to do such a thing until the question is asked?

Mr. Coleman: Yes, your Honor.

The Court: Am I right?

Mr. Coleman: Yes.

The Court: And you have objected on the ground that it—

Mr. Woods: One of my objections, of course, goes back, I don't think the cases say that at all. They say if you have reason to believe.

The Court: All right.

Mr. Woods: And I think there is ample reason to believe, Mr. Coleman, we wouldn't be up here if Mr. Coleman didn't have reason to believe.

Mr. Coleman: Your Honor, we are up here because of my respect for this Court and my desire to see the defendant is protected in his rights.

The Court: All right. I will tell you what we are going to do. We are going to dismiss the (553) jury, and we will find out in the jury's absence if he is going to take the Fifth Amendment.

Mr. Coleman: Thank you, your Honor.

The Court: If he does, that settles it.

(The following proceedings were had in the presence of the jury, in open court.)

The Court: Ladies and gentlemen of the jury, I will excuse you for a few minutes.

(Whereupon the jury was excused from the court room at 3:05 o'clock p.m.)

The Court: Now, Mr. Coleman, you had a question to propound, I believe, in the absence of the jury?

Mr. Coleman: Yes, your Honor, I do.

May I do so now?

The Court: You may do so.

Direct Examination

By Mr. Coleman:

Q. Would you please state your name, sir?

A. Leaun Harrelson.

Q. And your address, sir.

A. 3080 Percy King, Waterford, Michigan.

Q. And what is your occupation, sir?

A. Because I am under four counts of Federal indictment, and (554) on advice of my counsel, I refuse to answer the question on the grounds it may tend to incriminate me.

The Court: All right, counsel, there is your answer.

Mr. Woods: Our objections are noted.

The Court: Your objections are noted.

Mr. Coleman: Your Honor, may I propound each of the three questions?

The Court: I think we have gone far enough.

Mr. Coleman: Very well.

The Court: We know what the answers are going to be.

Mr. Coleman: May the witness be excused, your Honor?

The Court: The witness may be excused.

* * * * *

(370a) The Court: Now, counsel, so we have it clear on the record, I take it that both sides have rested?

Mr. Coleman: Yes, your Honor.

Mr. Woods: Yes, sir.

The Court: Now ladies and gentlemen of the jury, there are a number of matters for the Court to consider out of your presence, having to do with this trial. There will be no point in your coming in on Friday.

Monday is a day, as you know from our experience last Monday, on which the Court takes care of the other business of the court, so I am going to ask you to return, please, at 9:30 on Tuesday morning.

Now, once more I admonish you not to (582) read anything, should anything be in the papers, not to read it. Keep strictly away from it, no radio, no television, no talking, and if anyone tries to talk to you, it should be reported to me, and with that I will now excuse the jury while we go ahead with other matters.

(Whereupon the jury was excused from the courtroom at 11:38 o'clock a.m.)

(583) The Court: I await your pleasure, gentlemen, at any time.

Mr. Woods: Two motions, your Honor.

One is to renew my motion for judgment of acquital.

The second is to renew—

The Court (interposing): Excuse me, Mr. Woods, a technicality, possibly.

Are you renewing the motion that you made at the close of the Government's case, or are you not only renewing that motion but making a motion at the close of all of the evidence, for acquittal?

Mr. Woods: I am. I am renewing my initial motion for judgment of acquittal, and I am making a motion for judgment of acquittal at the conclusion of all of the evidence in the case.

The Court: I understand.

Mr. Woods: And I am not only renewing my motion for a judgment—excuse me—motion for a mistrial, but I am also making now a motion for a mistrial based on all the evidence.

I am going to be very brief, your Honor, which is probably the only good news we have had in days.

To my original motion for judgment of acquittal, I would ask that it stand as repeated word for word, and add

merely to it the fact that I think that in the consideration (584) of such a motion for judgment of acquital as is being made at the conclusion of all of the evidence in the case that the court can then properly consider all the evidence, and I would merely direct the court's attention to that evidence that has been added in this case since the conclusion of the Government's case in chief.

My observations on that, your Honor, are confined to merely that they have done nothing to establish the charge that is found in the indictment. In all justifiable inferences that might be given to their evidence and their case in chief, nothing has been added to bolster it or support it in any way, at that, at this point, and this posture, that being the case, if upon consideration of all the evidence the evidence points as much to the innocence of this defendant, within the confines of the indictment charges he has against him, if it points as much to his innocence as it does to his guilt, then this court should grant a motion for judgment of acquittal.

Going to the motion for mistrial, I do think the court committed grievous and reversible error in the admission of testimony of the several witnesses who appeared for the Government and took the Fifth. The Government knew they were going to take the Fifth, and I think the court committed reversible error when it, in effect, permitted the Government to impeach its own witness without (585) having required the Government to lay a foundation therefor.

The effect of that testimony on this jury, most assuredly, in our opinion, absolutely foreclosed that jury from having any dispassionate or objective appraisal of the evidence that they, up to that point, had before them.

I do not feel that after that happened this defendant could have a fair and objective trial.

I feel, too, your Honor, that the error of it in the first instance was but compounded through the repeat performance of those successive witnesses who came in and did the same thing, and, in effect, buried this defendant in the eyes of that jury.

I respectfully submit that your Honor grant the motion for judgment of acquittal and that your Honor declare a mistrial.

The Court: Thank you, counsel. Mr. Coleman?

Mr. Coleman: As far as Mr. Woods' two motions for judgment of acquittal, one being a renewal and one being based on all the evidence, the Government believes that it has established such evidence for the case to go to the jury, upon which they could base a verdict of guilty as charged, and we will not further elaborate on that rather than to repeat the arguments we have already made, or refer to them.

(586) As far as the motion for mistrial, counsel for defendant said he is making a motion for mistrial based on all the evidence, and we would just like to have clear that I don't believe that is a proper motion—a motion for mistrial based on all the evidence. Counsel has to specify—I think he has specified throughout the trial the areas to which he objects and on which he based at the time motions for mistrial.

Considering the motion in that light, the Government at this time will merely refer to its previous arguments and citations of cases in this regard.

Other than that, your Honor, we have no further comment.

The Court: Mr. Woods, do I construe properly your motion for mistrial to be—

Mr. Woods (interposing): I am sorry, your Honor. I didn't hear you.

The Court: Do I construe properly your motion for mistrial to be directed to the Fifth Amendment matters you spoke of?

Mr. Woods: In part. I direct that also, your Honor, to the fact that the Government put in, by way of rebuttal testimony, that testimony which I feel had no part or parcel of rebuttal testimony, coupled with the so-called Fifth Amendment witnesses.

(587) The Court: Thank you.

Now, gentlemen, as far as the—do you wish time to confer?

Mr. Woods: No, sir.

The Court: So far as the renewal of the motion for acquittal at the close of the Government's case is concerned, that motion will be denied for reasons that have heretofore, I think, been made clear.

So far as the new motion for acquittal at the close of all the evidence is concerned, the court takes it under advisement.

So far as the motion for mistrial upon the Fifth Amendment grounds and the allegedly improper rebuttal testimony, such motion is denied.

Now, I will ask counsel to submit to me at their early convenience proposed charges, so that—and instructions, so that the court may consider them, and I will later ask to confer with the court in chambers on the objections you make to the other party's instructions, and at that time an opportunity will be afforded you to perfect your record on objections on those grounds.

Mr. Woods: Yes, sir. Thank you.

Mr. Coleman: Thank you, your Honor.

The Court: Thank you, gentlemen. We will now adjourn.

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GOVERNMENT'S ARGUMENT TO THE JURY

(473a) Well, let's put this in even a better perspective. *What we tried to do after that, ladies and gentlemen, was to call some people who knew what the ordinary,* the necessary, the customary conduct of union business was. *We tried to call other officers and other business agents* and put them on the stand, some of these stewards, and let them tell you the proper story of what union business i

And we learned from the ones that (764) *testified* that a business agent has certain companies that he, himself, supervises. That there are 75 to 80 stewards. That the problems they can't solve in the matter of grievances they take to their individual business agent who is in charge of their company. (Italics supplied.)

* * * * *

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No. 844

In the Supreme Court of the United States

OCTOBER TERM, 1964

FLOYD B. HARMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 536–543; Pet. App. 15–23) is reported at 339 F. 2d 354.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1964 (R. 535; Pet. App. 24), and the petition for a writ of certiorari was filed on January 18, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an official of a labor organization, who uses credit cards belonging to that organization to charge personal expenses and pays these bills through

checks of the organization signed by him, has committed embezzlement and conversion of union funds in violation of 29 U.S.C. 501(c).

2. Whether petitioner's conviction should be reversed because the government called in rebuttal three witnesses whom it had reason to believe might claim the privilege against self-incrimination and who in fact did so.

STATUTE INVOLVED

Section 209(c) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 529, 29 U.S.C. 439(c), provides:

> Any person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept by any provision of this title shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

Section 501(c) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 536, 29 U.S.C. 501(c), provides:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT

A 24-count indictment returned in the United States District Court for the Eastern District of Michigan charged petitioner with willful embezzlement and con-

version to his own use of funds belonging to Local 614 of the International Brotherhood of Teamsters and with having willfully caused false entries relating to those funds to be made in the books and records of Local 614, in violation of 29 U.S.C. 501(c) and 439(c), respectively (R. 1–14). After a trial by jury, petitioner was found guilty as charged (R. 528–529). On July 31, 1963, he was given a general sentence of probation for two years and, on an embezzlement and conversion count, ordered to pay a fine of $1,500 (see R. 533). The court of appeals unanimously affirmed (R. 535, 536–543; Pet. App. 15–23, 24).

The pertinent facts may be summarized as follows:

1. During the relevant periods, petitioner was the Secretary-Treasury of Local 614 which had offices in Pontiac, Michigan (R. 60–62, 110). Petitioner was in charge of the Local and signed all of its checks (R. 62–63, 71, 110, 124; see R. 76–83). With but a few exceptions, petitioner approved for payment all invoices submitted to Local 614 (R. 62–63, 67, 72, 111–113, 124; see R. 71–83).[1]

From 1959 to 1961, petitioner possessed a thirty-foot cabin cruiser which he used on the waters of the greater Detroit area (R. 27, 54, 56). Local 614 did not own a boat at that time (R. 96). During this period, petitioner obtained from various waterside marinas boat gasoline, boating equipment (*i.e.*, boat "bumpers," helmsmen seats and a bilge pump) and general store items which he had charged to oil com-

[1] The office manager did not need petitioner's prior approval to write out checks in payment of wages or utility charges (R. 124).

pany credit cards made out to Local 614 (R. 32–35, 36–43, 54–55; see R. 58). On these occasions, petitioner was accompanied on board the boat by various people, including his family (R. 35, 50, 54, 57, 58–59).

In mid-1960, petitioner applied for and obtained a Mobil Oil Company credit card which was made out in the name of Local 614 (R. 28–29). Petitioner subsequently gave this credit card to the proprietor of a waterside marina with instructions not to use it "for small amounts" but to "keep it between $25.00 and $30.00" (R. 30, 31, 44, 49). Only petitioner had access to this credit card (R. 95). Petitioner signed a number of blank credit slips which he left with the proprietor of the marina (R. 30, 43–44). In a "roundabout way," petitioner told the proprietor not to tell his employees about the arrangement (R. 32).

At regular intervals during 1959 to 1961, the oil companies which had issued credit cards to Local 614 submitted invoices to the Local for the amount of the credit purchases. A portion of the invoices submitted by three oil companies included charges incurred by petitioner on his boat;[2] the invoices from the Mobil Oil Company related only to the boat charges (R. 36–43, 71–85). After petitioner approved the payment, these invoices were paid by checks from Local 614 which he signed (R. 71–85, 112–113, 127). The payments were entered in the Local's cash disbursements journal as "car and transportation" expenses (R. 84–85, 94–95). The check stubs reflected

[2] Other business agents of Local 614 were authorized to use credit cards on the purchase of gasoline, oil, etc., for automobiles used for business purposes (R. 64, 65, 118).

that the payments were made for automobile expenses (R. 71–83).

On January 2, 1962, petitioner gave to an employee of Local 614 personal checks signed by him for $1,100.00 and $415.67 with the Local as payee (R. 102–103). When subsequently asked by the bookkeeper as to the purpose of the checks, petitioner replied that he would have to talk to the accountants about it (R. 104). On January 3, 1962, investigators from the Bureau of Management Reports of the Labor Department entered the Local's offices and commenced to examine its books and records (R. 107–108, 129). In May 1962, petitioner told the Local's bookkeeper that he had been told that he should "pay the money back into the union," and that these payments were for the "Mobil gas card" (R. 106, 125).

2. At the trial, the defense called as witnesses the president of another Local, several shop stewards belonging to Local 614, two attorneys, and several parties connected with the management of small businesses. These witnesses testified that between 1959 and 1961 they and petitioner took boating cruises on petitioner's boat, and that on such trips they and petitioner discussed such things as employee grievances, jurisdictional disputes, union organizational activities, problems with which Local 614 was confronted, and the like (R. 172–174, 178–179, 181–182, 189–192, 194–195, 197, 202–203, 206, 210–212, 218–219, 221, 224–226, 252–254, 256–259, 267, 270, 272). Generally speaking, these witnesses had known petitioner for a number of years (*e.g.*, R. 198, 205). Three of them testified that while on these boating trips they

either discussed union business and fished or simply fished (R. 187–188, 192–193, 197); another testified that his 30 to 40 boat trips with petitioner were for business and social reasons (R. 270, 272). The wives of petitioner and others were sometimes present on various boat trips (R. 211–212, 281, 287). Petitioner did not testify.

3. In rebuttal, the government called a number of witnesses. Six witnesses testified that they were either stewards or were otherwise officially connected with Local 614 during the periods in question, and that they never discussed union business on petitioner's boat (R. 320–322, 343–344, 357–358, 359–360, 361–362, 368–369). Two of these witnesses testified that to their knowledge other union stewards had not been invited onto petitioner's boat to discuss grievances (R. 322, 344–345). Two others testified that they did not know whether other stewards had been on the boat to discuss business with petitioner (R. 358, 362).

The government also called as witnesses four additional officials of Local 614. After answering a few questions on direct examination, three of them (a vice-president, a business agent, and an organizer) invoked the privilege against self-incrimination when asked questions pertaining to their duties with the Local. They also invoked the privilege when asked whether petitioner's boat had been used for the conduct of union business. One witness also did so when asked whether he knew the petitioner; and another when asked whether petitioner had refused to turn over certain receipts (R. 302, 315, 318–319, 340–341,

342, 346–349). The fourth witness who invoked the privilege, the president of Local 614, was examined outside the presence of the jury because government counsel informed the court that he had information that the witness would, besides invoking the privilege against self-incrimination, state that he was under indictment (R. 349–355).

After the first of these witnesses invoked the privilege, the court excused the jury and counsel for petitioner moved for a mistrial (R. 302–303). During the colloquies which followed, government counsel explained his position as follows (R. 304, 306–307):

> Mr. COLEMAN [government counsel]:
>
> What is the position of the Government here? The Government has a duty here. The Government has a duty to society. There are certain people involved that know something about this matter. Is it the election of the defendant to pick and choose and say I am going to bring in a half a dozen people here that are going to tell the story I want the jury to hear?
>
> What about these other people that know something about it? Doesn't the Government have the right, doesn't the Government have a duty to bring these people before the jury to get the truth? Isn't a trial to get the truth? We put these people on the stand. If we didn't put these people on the stand, what would the jury think? Why didn't the Government call them? They have the power of subpoena. Why didn't they bring them in here? The Government has a duty and a right to do it. If the Government did not do it, it would hurt the Government's case.

The case law on this is clear, it says there has to be overwhelming reasons for the witness to take the Fifth Amendment. It has to be asserted to each and every question. It can't be a blanket refusal before they take the stand.

* * * * *

Certain witnesses were questioned last Friday, and they did give answers. We were informed by counsel that they were going to take the Fifth Amendment today. We called them in. We talked to them. They said they would take the Fifth Amendment. Then we stressed to them certain duties and obligations of these witnesses. Certain things they should search their own minds and consciences for. Then we left them to do that searching of the conscience.

The COURT. You have not talked to them since?

Mr. COLEMAN. We have not talked to them since.

May I add one thing, your Honor? May I add this, no matter what went on then, it is case law position that the Government, no matter how much a witness may say beforehand that he will take the Fifth Amendment, that you never really know the witness is going to take the Fifth Amendment until he is up on the witness stand, until he has the oath administered to him to tell the truth before the Judge and jury and the question is put to him. That is case law.

After further argument, the court ruled (R. 311):

In the first place, in view of what is before me, I cannot find that the Government knew what action this witness would take at the time he was called to the stand.

> Certain representations, I am told, had been made to him and had been left unanswered.
>
> In addition, I think the cases are clear that the Fifth Amendment cannot be asserted in advance of questions actually propounded.
>
> If the law were otherwise, it would preclude a Court's examination into the reasonableness of the grounds asserted.
>
> I also point out to you that in certain of the cases to which reference has been made, the questions propounded touched the vital elements of the charge, and there might have been some grounds—I say might have been some grounds—for the jury's inferring that certain answers might be made. That was not the case here. These were preparatory questions, so in view of these facts, the motion for mistrial will be denied.

Shortly thereafter, the jury was recalled. When the witness re-invoked the privilege, the court told the jury (R. 316):

> The fact that a witness, called by the Government, refuses to answer certain questions directed to him, which may have some bearing on the case, should not be construed against the defendant in any way, since the witness, by so refusing to answer, merely stands upon his constitutional right not to subject himself by self-incrimination to a possible criminal prosecution.

This instruction was repeated later in the trial as to the other two witnesses who invoked the privilege before the jury (R. 341–342, 346–347). Defense counsel requested the court not to repeat this instruction in the court's final charge to the jury (R. 439).

On cross-examination, the three witnesses who invoked the privilege before the jury testified that they had informed government counsel either the day they were called as witnesses or a few days earlier that they would invoke the privilege against self-incrimination if called to testify at the trial (R. 318, 341, 348). On redirect examination, the witnesses invoked the privilege when asked whether on the Friday before the trial commenced they had told the prosecutor that they knew nothing about petitioner's boat (R. 318–319, 342, 349). One of the three witnesses, who had said on cross-examination that he had invoked the Fifth Amendment before the grand jury, testified on redirect that he did answer some questions before the grand jury but that "after a lot of consideration I think I was wrong in a lot of things I answered" (R. 318).

ARGUMENT

1. Petitioner contends (Pet. 2, 11–12) that his unauthorized use of the Local's credit cards did not constitute embezzlement under 29 U.S.C. 501(c). He reasons that embezzlement requires that the employee receive the funds he later embezzles from his employer, while here the funds were received by third parties and the petitioner never had them at any time.[3]

Petitioner's contention is erroneous for three reasons. First, Section 501(c) does not prohibit merely

[3] If petitioner were correct on this contention, the sentence of two years' probation would still stand since it was a general sentence on both the 12 counts charging embezzlement and conversion and the 12 counts charging falsification of the Local's books. However, the fine of $1,500 on count one would be invalid.

the embezzlement of union funds. Instead, it provides that "[a]ny person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use * * * any of the moneys, funds, securities, property or other assets of a labor organization" is guilty of a felony. Consistent with this Section, the indictment charged that petitioner "did unlawfully and willfully embezzle *and convert to his own use*" various sums of money belonging to the Local (emphasis added) (R. 2–6). Conversion, of course, is much broader than common-law embezzlement. As this Court pointed out in *Morissette* v. *United States,* 342 U.S. 246, 271–272:

> Conversion * * * may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact. It is not difficult to think of intentional and knowing abuses and unauthorized uses of * * * property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining.

After instructing the jury on the elements of the offense of embezzlement, the trial court charged that conversion to one's own use "means that one applies,

appropriates, uses or sells the goods or other property of another for one's own benefit or profit" (R. 517). Petitioner does not challenge that instruction. Since the record shows that petitioner, without authorization, used the Local's credit cards, knowing that such use would result in payment by the Local of petitioner's personal boating expenses, the jury's finding that petitioner used the Union's funds for his own personal benefit was amply supported by the evidence.

Second, even if the government were required to prove embezzlement in this case, Section 501(c) does not adopt the technical common-law definitions of that crime upon which petitioner relies. Congress clearly intended that Section 501(c) be interpreted and applied broadly in order to secure the highest degree of fiduciary responsibility on the part of representatives of labor organizations who occupy positions of trust. Section 501(a) expressly states:

> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder * * *.

See also H. Rep. No. 741, 86th Cong., 1st Sess., pp. 9, 44-45; S. Rep. No. 187, 86th Cong., 1st Sess., pp. 12, 42. As the court below observed (Pet. App. 18),

"it would appear that technical common-law distinctions of various types of crimes were not intended to be rigidly applied." Cf. *Hayes* v. *United States,* 329 F. 2d 209, 220–221 (C.A. 8), certiorari denied, *sub nom. Bennett* v. *United States,* 377 U.S. 980; *United States* v. *Harrelson,* 223 F. Supp. 869, 870 (E.D. Mich.).

Finally, even if the government were required to prove common-law embezzlement, the evidence sufficiently shows that the petitioner's conduct constituted such embezzlement of union funds. As shown by the Statement above, petitioner approved for payment the various invoices submitted to the Local and actually signed its checks. Thus, petitioner himself paid the union's funds to satisfy his own debts. In these circumstances, there can be no doubt that petitioner lawfully came into possession of the funds and disposed of them for his own use.

2. Petitioner contends (Pet. 5–11) that his conviction should be reversed because the government called three witnesses to the stand knowing that they would claim the privilege against self-incrimination. However, this contention is controlled by the Court's decision in *Namet* v. *United States,* 373 U.S. 179. There, the government during its case-in-chief called two witnesses who had previously pleaded guilty to charges similar to those on which the defendant was subsequently convicted. These witnesses interposed the privilege against self-incrimination as to questions seeking to elicit information concerning their relationship with the defendant, and the privilege was upheld. The prosecutor had previously been advised by defense counsel that the witnesses, if called, would

invoke the privilege against self-incrimination. In affirming the conviction, the Court stated that the prosecutor was not guilty of misconduct because the non-privileged information possessed by the witnesses had substantial value to the government's case. The Court then held that it could not find that "the few invocations of privilege by the [two witnesses] were of such significance in the trial that they constituted reversible error even in the absence of prosecutorial misconduct" in view of the other evidence before the jury. *Id.* at 189.

a. Similarly, there was no misconduct on the part of the prosecutor in calling and examining the three officials of Local 614 who invoked their privilege against self-incrimination before the jury. As shown by the Statement, one of these witnesses had testified to certain matters before the grand jury, and all of them had been interviewed five days before the trial commenced and "did give answers" (R. 306). While it is true that the prosecutor was subsequently advised by defense counsel and the various witnesses that, if called to testify, the privilege against self-incrimination would be asserted, he was under no duty to accept at face value such advance assertions and decline to call and question the witnesses at the trial. See *Namet* v. *United States, supra,* 373 U.S. at 188.

The prosecutor "stressed to [the witnesses] certain duties and obligations" and left them to "search their own minds and consciences" about testifying (R. 306–307). At the trial the few questions asked these witnesses related to their duties with the union, the

use of petitioner's boat, whether one witness knew petitioner, and whether petitioner had refused to turn over certain receipts. Since these are not questions obviously and closely involving the possibility of incrimination, the prosecutor could reasonably hope that the witnesses, upon reflection concerning their obligation as citizens, would answer them.

Moreover, there was good reason for the government to call the three witnesses. As shown by the Statement, a number of shop stewards and other witnesses testified for petitioner in an effort to show that his boat was used in the conduct of union business. Since petitioner did not call any of the officials of Local 614 to testify on this point—parties who would have been in a position to describe the union's practices, if any, in relation to petitioner's boat—the government had the right to call those officials most likely to have knowledge on that subject. To be sure, the government did call and elicit testimony from shop stewards connected with Local 614 during the periods in question and some former officials of the Local. However, their testimony was not as authoritative as that of the witnesses in question—a vice-president, an organizer, and a business agent—all of whom had previously co-operated to some extent with the government.

b. Again as in *Namet,* the invocations of the privilege were not so significant in petitioner's trial as to justify overturning his conviction in the absence of misconduct by the prosecutor. Most of the questions which the witnesses refused to answer were prelimi-

nary. While the questions whether petitioner's boat was used for union business related to petitioner's defense, they did not depict the crime itself. More importantly, the trial lasted seven days, and some 26 witnesses were called. As the court below noted, the government's case was supported by "strong, corroborated evidence" (Pet. App. 22).

In addition, unlike in *Namet* where no instruction was asked or given (373 U.S. at 190), the court here promptly cautioned the jury that they were not "in any way" to construe against petitioner the refusal by government witnesses to answer questions propounded to them since the witnesses merely stood upon their constitutional right against self-incrimination (R. 316). This admonition was repeated later in the trial (R. 341–342, 346–347). In its final charge to the jury, the court, at petitioner's request, did not again give this instruction. However, it did charge that the government bore the burden of proving each of the essential elements of the crimes charged and of establishing guilt beyond a reasonable doubt; that a defendant was "not to be convicted on mere suspicion or conjecture"; that the jury was to base its verdict upon the evidence and "the law as stated by the Court"; and that the evidence in the case consisted of the "sworn testimony of the witnesses, all exhibits which [had] been received in evidence, all facts which [had] been admitted or stipulated, and all applicable presumptions stated in [the] instructions" (R. 512–513, 516, 519–521, 524). The jury must be presumed to have followed these instructions. *Delli Paoli* v.

United States, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95.[4]

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1965.

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[4] The decision below does not conflict with *Fletcher* v. *United States*, 332 F. 2d 724 (C.A. D.C.), as petitioner asserts (Pet. 5-6, 10). In that case, unlike here, the record showed that the prosecutor and the court "knew" that the witness would invoke the privilege against self-incrimination to various questions propounded; that the questions "depicted the alleged offense in its entirety"; that the trial lasted for only about six hours and the witness' "part in it was a major feature of the proceeding"; and that the court's cautionary instructions were unclear since the jury might have understood a particular statement "to mean that [the witness'] refusals might be considered along with other evidence as proof of Fletcher's guilt." *Id.* at 726-727.

Petitioner also relies (Pet. 9-10) on several cases in arguing that a cautionary instruction is not sufficient. However, these cases all preceded *Namet*, with the exception of *Fletcher*. In the latter case, the court expressly stated that it was not considering the situation where a "forceful instruction to the jury" was given. 332 F. 2d at 727. The other cases cited by petitioner hold, at most, only that an instruction is not sufficient where the prosecutor has committed misconduct by calling the witnesses to the stand. Here, as we have seen, no such misconduct was committed under the principles laid down by this Court in *Namet*.

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, petitioner in the above captioned cause requests the Court to review its order of March 15, 1965 denying Certiorari and that it reconsider Questions I and II. For his grounds, petitioner calls to the Court's attention the decision of the United States Court of Appeals for the Fifth Circuit in *San Fratello v. U.S.*, 340 F. 2d 560, decided on January 20, 1965, subsequent to the filing of the petition for Writ of Certiorari and reported March 8, 1965.

The questions presented in the case are almost identical to Questions I and II in the instant case. The Court there stated the questions as follows:

> "The only questions presented here which merit discussion arose out of the action of the Court in permitting the prosecution to call San Fratello's wife as a witness so as to require her to claim her privilege against self-incrimination in the presence of the jury, after it had been known to the Court in the absence of the jury that the witness had claimed her privilege as to the same matters in a previous trial and that she had just advised the prosecutor that she would assert it in this case. *The questions are whether it was error to overrule San Fratello's objection to her being required to claim her privilege in the presence of the jury, and if so, whether the error was rendered harmless by the Court's instruction to the jury in connection with the matter.*" (340 F.2d 560, 562) (emphasis added).

The Court held that it was error to allow the witness to claim her privilege in the presence of the jury in the circumstances of the case, and, further, that this error was not rendered harmless or corrected by the Court's instructions to the jury concerning the plea of privilege of the Fifth Amendment submitted by the witness. It is submitted that this holding is in direct conflict with the decision of the Sixth Circuit Court of Appeals in the instant case wherein it was held that the privilege could be asserted before the jury and that in any event an instruction cures the error, if any there may be.

The *San Fratello* decision also conflicts with the decision in the instant case in one further particular which demonstrates the need for this Court to affirmatively determine the proper procedures to be followed in such cases. The Fifth Circuit decision makes it very clear that

the circumstances require a separate hearing in the absence of the jury. When the parties know, or should reasonably know, that certain witnesses intend to refuse to answer questions on the ground of privilege against self-incrimination, and this is communicated to the Court, it is necessary to call and examine them in the absence of the jury. It can then be determined to what extent they intend to claim privilege and whether or not such claim is valid. The opinion also makes clear that it is incumbent upon the Court to make such investigation to avoid the inevitable effect of such an examination before the jury.

The Sixth Circuit makes it equally clear that no such procedure is necessary and that any error resulting therefrom may be cured by a proper instruction to the jury. It held the Court has no right to preclude either party from calling witnesses. It further held the Court has the opportunity to pass upon the issue only after the witnesses are called and the questions put to them, and they invoke their privilege. All this may be done in the presence of the jury.

The *San Fratello* decision further stated,

> "Even in the face of this inevitable inference, it may well be proper in some cases to have the proceeding in the presence of the jury where the government is dealing with what has sometimes been called the 'ordinary' witness; that is, with one not so closely connected with the defendant by the facts of the case, the pleadings, or relationship that the inference of the witness' guilt would likely be imputed to the defendant. The circumstances could be such that the jury would naturally expect the witness to be called. But a defendant's spouse or a co-defendant would not come within that category." (P 565.)

The exception as above stated was found not to be applicable in the facts of that case.

The instant case does not fall within the exception stated above concerning the "ordinary" witness. The petitioner was the Secretary-Treasurer of the Local Union. The witnesses held the offices of Vice-President, Business Agent and Organizer of the same Local. The two-fold inference to be drawn by a layman from their claims of privilege is that (1) they were a confession of crime, and (2) that the crime was involved in the allegations against the defendant. They were, therefore, so closely connected with the petitioner by the facts, pleadings and relationship, that the inference of their guilt would be imputed to the petitioner. The jury could not have inferred the witnesses were guilty without concluding that it was through participation with the petitioner in his alleged crime.

The Court in this case did not concern itself with the purpose behind the prosecution's calling the witnesses. It merely stated the prosecution's contention that the defendant did not have a right to hand pick the witnesses and that the prosecution had a duty to resort to all sources of supplying information. The Court did state that the testimony of the three witnesses was not needed.

The circumstances here were not "such that the jury would naturally expect the witnesses to be called," as was held by the Fifth Circuit to be a possible justification for calling them. If the witnesses had not been called by either side, the jury might equally have inferred that the petitioner did not call them because their testimony would not support his defense as that the prosecution did not call them because it would have supported his defense.

This fact, coupled with the Appellate Court's statement that their testimony was not needed leads to the same con-

clusion as the Fifth Circuit reached, namely, that there was no purpose in calling them and requiring them to claim their privilege against self-incrimination other than to use their conduct as an incriminating circumstance against the petitioner. Their claim of self-incrimination in refusing to disclose their knowledge of petitioner's use of the boat on union business put the stamp of criminality on his conduct. This conclusion is strengthened by the fact that the validity of their claim of privilege was never challenged nor ruled upon in a single instance.

It is apparent that the Fifth and Sixth Circuit Courts differ markedly in their approach to the problem of procedure to be employed in a situation where the prosecution or defense counsel advise the Court that a witness is going to interpose a plea of self-incrimination rather than answer any question. The Fifth Circuit quite obviously holds that the Court has an affirmative duty to protect the accused from the prejudicial effect of circumstances such as the ones here against which he has no means of protecting himself. The Sixth Circuit interprets the role of the Court to be a more passive, formalized one of attempting to overcome any prejudice created by proper instructions. The Court has no duty to determine by a separate hearing the validity and extent of the privilege and to exclude the witness or certain questions if the effect of repeating it before the jury will be unduly prejudicial to the accused. It apparently would only require the Court to react, rather than act affirmatively.

It is submitted that the two decisions present a substantial conflict. One holds that the Court must determine out of the presence of the jury the validity and extent of a witness' privilege to refuse to testify and that failure to do so can not be cured by an instruction. The other holds the Court has no duty of affirmative action and that any

prejudice resulting from the privilege being elicited in the jury's presence may be cured by an instruction. Such a substantial conflict requires this Court to consider and determine the proper procedures to be followed.

For the foregoing reasons, petitioner requests the Court to vacate its earlier order denying certiorari and grant certiorari to petitioner on Questions I and II.

Respectfully submitted,

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